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Office of Legislative Counsel

28 Jan 1978

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in further response to your request for our comments on the Justice Department's proposed amendment on S. 1845, a bill "to protect the rights of individuals guaranteed by the Constitution of the United States and to prevent unwarranted invasion of their privacy by prohibiting the use of polygraph-type equipment for certain purposes." For the reasons outlined below, we would oppose adoption of the Justice Department's proposed amendment.

In the first place, the scope of the proposal is uncertain. This ambiguity, I believe, derives in part from the fact that the proposal specifically prohibits the use of polygraphs by U.S. officers or employees for employment-related purposes, but then provides certain exceptions for "polygraph tests" without modifying or clarifying language, such as the word "such" before "polygraph testing" at line 11. Without such modification, which we believe would be necessary, it is unclear whether all polygraph testing by the Government would be strictly limited to that authorized in subparagraphs (b)(1)(A) and (b)(1)(B) of the bill, or whether, as we believe the intent to be, the exceptions apply only to the described category of activities--"in connection with his or her services or duties..." (i.e., employment-related activities).

Furthermore, the Justice Department amendment would place all polygraph testing authorized by the bill under the control and regulations of the Civil Service Commission. To vest the Commission with such authority would seriously impair the ability of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure as provided for by the National Security Act of 1947, as amended (50 U.S.C. 403). The Director must continue to have the sole authority to prescribe internal regulations

for the Agency regarding all employment-related polygraph testing. Presently, the Agency polygraphs only one category of persons according to Civil Service regulations. These persons are in the competitive service and are not Agency employees but provide a service to the Agency; the Agency can only polygraph these persons following Civil Service regulations. However, the Agency follows its own regulations for the polygraph testing of all other personnel connected with the Agency.

Moreover, under the scheme proposed by the Justice Department amendment, Agency rules and regulations would become subjected to section 553 of the Administrative Procedure Act, including advance public notice and the opportunity for public participation in the rule making process. The intelligence responsibilities performed by the Agency are fully excluded from the requirements of section 553 of the Administrative Procedure Act because they fall within the existing exemption for military or foreign affairs functions. This intelligence function should remain excluded generally from the public rule making procedure in order to continue to protect fully sensitive intelligence matters from public disclosure.

The exemptions on the prohibition of the use of polygraphs proposed in the Justice Department amendment are inadequate in that the amendment does not cover assignees, employees of cover facilities, and contractor employees who only serve as support for intelligence or counterintelligence functions. Moreover, support and security personnel would have to have duties "directly" related to intelligence and counterintelligence functions to come within the scope of the exemption created by the Justice Department language. In addition to being very restrictive, the "direct" function test is ambiguous and would be difficult to apply.

Finally, it should be noted that it is paragraph (b)(2) of the bill, not (b)(1), which would prohibit the polygraph testing of contractor employees. Any exemption created for contractor employees should be an exemption from paragraph (b)(2).

For these reasons, we could not accept the proposed Justice Department amendment. We also suggest that any exemption for the Central Intelligence Agency be provided for separately and apart from that for the Justice Department. Despite the Justice Department's stated intent to cover intelligence agency polygraph use by general exemptions and by noting that legislative history would suffice for the specific identification of personnel, serious problems in construction and coverage are created when an amendment attempts to link guidelines for polygraph use in criminal investigations with a general authority for intelligence agencies to use the polygraph in security investigations. We therefore propose that OMB support the amendment submitted by this Agency in our report of 4 November 1977 on S. 1845.

Sincerely,

George L. Cary

Legislative Counsel

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